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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 980.

ELECTRIC FURNACE CORPORATION,

Petitioner,

v.

DEERING MILLIKEN RESEARCH CORPORATION,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

B. P. GAMBRELL,
1234 National Bank of Georgia Bldg.,
Atlanta, Georgia 30303,

RAY H. MOSELEY,
Maclellan Building,
Chattanooga, Tennessee 37402,

Attorneys for Deering Milliken Research Corporation, Respondent.

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CORRECTION IN STATEMENT OF THE CASE.

In petitioner's "Statement of the Case" (petition page 4) it is stated as follows: "In April, 1956, while taking the discovery deposition of Mr. Livingstone, president of E-F, D-M obtained the names of his customers who were purchasing from him the patented articles, and later wrote a libelous letter to these customers. As a result of the letter, and the subsequent loss of business suffered by E-F, this suit was filed as a counterclaim in the patent suit." Respondent respectfully submits that the letter referred to should be described as the alleged libelous letter and that the alleged loss of business should be referred to as an allegation.

As appears on page 4 of the petition for certiorari, it is stated: "On motion of D-M the trial court, on March 16, 1965, filed an opinion denying a motion for judgment n.o.v., but granted a new trial on the 'issues of compensa-

tory and punitive damages only.'" It is true that following the second trial, the trial court, in passing on a motion for new trial, did in an opinion state, "The new trial, however, will be limited to the issues of compensatory and punitive damages only, the verdict of the jury being permitted to stand with regard to all other issues in the case." There was, however, a second opinion written before the order granting a new trial was signed. The second opinion was rendered on June 4, 1965 and amended the first one so as to provide for a new trial on all of the issues in the case. (Respondent's appendix pages 13 to 16.) The order for new trial also provided for a new trial on all of the issues. (Respondent's appendix pages 17 and 18.)

The fact that the case in the third trial was submitted on all of the issues is shown by an opinion of the District Court filed December 22, 1965, following the third trial. (Petitioner's appendix page 22.) In that opinion the court refers to previous opinions of March 16, 1965 and June 4, 1965. In the course of that opinion of December 22, 1965, the court also said:

> "Likewise, this Court found no error with respect to the issue of liability upon the second trial and is of the opinion that no error exists with respect to the issue of liability upon the third trial, all for the reasons heretofore set forth in the former opinions in this case." (Petitioner's appendix page 22.)

We say, therefore, that the issue of liability as well as damages was submitted to the jury in the third trial.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

We respectfully submit that petitioner for certiorari has not set forth grounds constituting sufficient reasons for the issuance of a writ of certiorari. (Rule 19.)

Petitioner presents four questions but under its caption "Reasons for Granting the Writ" apparently argues only its contention that there was sufficient evidence introduced in the trial of the case to support the verdict for the plaintiff. We, therefore, will devote our response mainly to answering that argument.

No evidence in the case is set forth in the petitioner's appendix, but on page 22, in the trial judge's opinion of December 22, 1965, dealing with the motion for new trial and motion for judgment n.o.v. following the third trial, it is stated in part as follows:

> "Mr. Livingstone testified upon the third trial to specific expenditures by the plaintiff in the sum of $834.36, including $20.00 spent in writing letters to all of its customers to whom the libelous letter was sent and $814.36 spent on travel expenses in going to see its more important customers in an effort to explain and mitigate the damaging effect of the libelous letter. Further evidence of a general loss of profits was offered by the plaintiff, but was excluded by the Court upon the ground that a general loss of profits is insufficient to base a verdict upon under the law of Tennessee in an action for libel per quod, proof of special damages only being allowed in such an action. Fry v. McCord, 95 Tenn. 678." (Petitioner's appendix pages 22 and 23.)

The trial judge in that opinion also said that "While the Court is of the opinion that evidence of special damages does exist in the record, it is the further opinion of the Court that the only evidence in the record of special damages is in the total sum of $834.36."

It thus appears that the District Judge held that evidence of traveling and letter-writing expenses by Mr. Livingstone was evidence of special damages. But the Court of Appeals held that these expenses did not constitute special damages, and we contend that the opinion of the Court of Appeals was correct. The Court of Appeals (*Electric Furnace Corp. v. Deering Milliken Research Corp.*, 383 F. 2d 352, 356) on that subject said in part as follows:

> "We believe, however, that there is a more important reason for holding that these expenses did not make out the actual or special damages necessary to make actionable that which is only libelous per quod. There was no evidence that Electric's standing with any of its customers was injured by the Deering letter. There was a total lack of proof that Electric lost any business *because* of that letter. In our first opinion we cited the case of Fry v. McCord Bros., 95 Tenn. 678, 33 S.W. 568 (1895) as authority for the proposition that such proof was necessary to support a verdict in an action for libel per quod. The court there expressed the relevant aspects of Tennessee law which govern this case; quoting in part from various authorities, it said:
>
> ' "[t]he plaintiff must show that his character has suffered from defendant's false assertions, and he can only show this by giving evidence of some special damage."
>
> * * *
>
> 'As to pleadings, it is held: "When a publication is not libelous per se, special damages must be allowed and proven in order to sustain the action."
>
> * * *
>
> ' "If the plaintiff cannot give the names of those who have ceased to deal with him, *and cannot prove that their ceasing to deal with him is due to*

defendant's words, he must fail in the suit, although there has been a falling off in his business."

* * *

'They cannot lawfully compensate the plaintiff for pain, mental anxiety, or general loss of reputation, in cases where the words are not actionable themselves, but must confine the assessment to the actual pecuniary loss strictly as alleged and proved." ' 95 Tenn. at 688, 689, 33 S.W. at 571. (Emphasis supplied.)

"It is of course familiar law that a plaintiff can recoup expenses incurred in an effort to minimize damages flowing from a tort. But here the sine qua non of a libel per quod action—proof of actual and special damages as the result of an alleged libel—is missing. There is, in effect, no tort demonstrated. We do not think, consequently, that Electric could create a cause of action or provide a basis for an award of damages by having Mr. Livingstone take a trip which included in its purposes the overcoming of damages which were not shown to have been inflicted; the expenses incurred thereby are not recoverable."

We respectfully submit that the Court of Appeals was correct in its conclusion that the expenses of Mr. Livingstone did not constitute evidence of special damages, and the petitioner has not cited any authorities to the contrary.

According to the evidence in this case which is in the record, not a single customer discontinued business with the plaintiff because of any alleged libelous phase of the letter of September 6, 1956.

The Sixth Circuit Court of Appeals, in its most recent decision (383 F. 2d 354), quoted from the previous decision (325 F. 2d 766) in part as follows:

"While Mr. Livingstone had some responses from customers concerning his letter of July 31, 1954, not one customer said that it had discontinued business with

the plaintiff because of any breach of promise by Mr. Livingstone or any misrepresentation made by him on behalf of the Electric Furnace Corporation."

In the decision following the first trial (*Electric Furnace Corp. v. Deering Milliken Research Corp.*, 325 F. 2d 766), the court said in part as follows:

"We conclude that there is a failure to offer any evidence to prove that Electric Furnace suffered any damages as a proximate result of the alleged libelous letter."

In conclusion in that decision the court said as follows:

"An appellate court may vacate, set aside or reverse a judgment of a District Court 'and may remand the cause and * * * require such further proceedings to be had as may be just under the circumstances.' (Section 2106, Title 28 U.S.C.) Under the circumstances disclosed by the record before us, we deem it appropriate and just, in this case to reverse the judgment of the District Court and grant a new trial. It is so ordered."

In the case when it was last before the Court of Appeals (383 F. 2d 357), at the conclusion of the opinion, the court said:

"The judgment is reversed and the cause remanded for entry of judgment for defendant on the merits, notwithstanding the verdict of the jury."

The fact that the Court of Appeals on the appeal following the first trial reversed the judgment of the trial court and ordered a new trial, and on the appeal following the third trial reversed the judgment of the trial court and ordered a judgment for defendant on the merits notwithstanding the verdict, is not ground for the grant of a writ of certiorari. Petitioner has not cited any authorities to

the effect that it is ground for the grant of a writ of certiorari.

Petitioner raises the question as to whether the Tennessee law is applicable in a libel case in a federal district court in Tennessee where the alleged libelous letter was written in South Carolina and published in several states.

As appears from the transcript of the evidence (page 89), Mr. Livingstone testified that after the letter went out he called on mills in cities in several states, including Knoxville, Tennessee. However, regardless of where the customers were and regardless of where the letters were received, the law of Tennessee would apply, for several reasons. First, it was the place of residence of the plaintiff and the place where the case was being tried, and second, no evidence of the law of any other state was introduced in evidence, and third, no complaint was made of the judge's charge on this subject.

A well-reasoned decision holding that the law of the place of domicile of plaintiff and the place where the case is tried is the law applicable is that of *Dale System, Inc. v. Time, Inc.*, 116 F. Supp. 527, 529 (2). There the court stated in part as follows:

> "But when it comes to determine the State, the law of which shall govern a case such as this of libel published in many states, there appear to be no cases in Connecticut, or New York, or indeed in other jurisdictions where the single publication rule prevails, which lay down an authoritative conflict of laws rule of general application or which even discuss the underlying problem. However, the subject matter has had some discussion in the law reviews. See 60 Harv. L. R. 941; 62 do. 1041; 63 do. 1272; 48 Col. L.R. 932. As the note just cited from the Columbia Review convincingly demonstrates, the 'single publication' rule fails to achieve its major objective as a needed devel-

opment of the substantive law if in practice it is tied to a multiple-publication, conflict-of-laws rule. The terrifying babel of media having publications of nation-wide and international scope urgently requires the development of a conflict of laws rule which shall provide the certainty so essential for the protection of the public, an ease of application which is so helpful to judicial administration and without which justice through litigation becomes for many an unattainable luxury, and an intrinsic realism whereby the existence and incidents of a libel may be determined by the law of the place in which generally, more often than not, the libel will have done the most harm. The law of the plaintiff's domicile, I think, best meets these and any other pertinent requirements. Acting vicariously, as it were, for the Connecticut courts I hold the Connecticut conflict of laws rule to be that the law of plaintiff's domicile is the law to be applied to a multi-state libel which has been communicated in the state of plaintiff's domicile as well as in other jurisdictions.

"Such a rule is not in essential conflict with traditional concepts. The Restatement of Conflicts of Laws in speaking of harm to the reputation says the place of the wrong is where the defamatory statement is communicated. Sec. 377, par. 5. In so stating, the reporter did not appear to have in mind a multi-state publication. But illustration No. 7, immediately following paragraph 5 of Sec. 377, expressly deals with a publication in two states and locates the place of wrong in that jurisdiction in which the plaintiff was well and favorably known. It is merely one more step in the development of the rule to say that in cases of publication occurring in several states in which plaintiff is well and favorably known, the law of the state of his domicile shall control because the most reasonable inference is that there he is better known than elsewhere. From the standpoint of tradition this development of the conflict of laws rule is no more radi-

cal than the development of the single publication rule.

"After all, a plaintiff's repute is his character and personality in the eyes of others. It thus comprises myriad relationships in all of which the plaintiff's individuality is the focus. Thus viewed, the concept of repute, even though not involving legal relationships, is akin to the concept of status which traditionally is determined by the law of the domicile. The same compelling reasons for applying the law of the domicile to the determination of one's status require that the law of the domicile should determine one's right to his good repute: in cases of multi-state libel generally the greatest harm to repute will occur in the state of domicile."

The court in the *Dale* case then went on to say that if the plaintiff under such circumstances is a corporation, the suit should be brought in the state of the domicile of the corporation.

As we have stated, no evidence was introduced at the trial of the law of any other state, so the presumption would be that the law of Tennessee applied, regardless of the states in which the letter was published and regardless of whether or not one of the letters was published in Tennessee.

In *Mutual Life Ins. Co. of New York v. Templeton* (1962), 50 Tenn. App. 615, 362 S. W. 2d 938, 942, the court stated in part as follows:

"Under the authority of T. C. A. Sections 24-607 and 24-608, this court takes judicial notice of the common law and the statutes of every other state. Where no Texas law is proven or found on a particular subject, it will be presumed that the law of Texas on such subject is the same as the law of Tennessee. Marsh v. Fowler, 207 Tenn. 377, 340 S. W. 2d 881; Hamilton v.

Peoples, 38 Tenn. App. 385, 274 S. W. 2d 630; Schenk v. Gwaltney, 43 Tenn. App. 459, 309 S. W. 2d 424."

Section 24-610 of Tennessee Code Annotated is as follows:

> "Evidence of foreign law.—Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise. [Acts 1943, ch. 137, § 4; C. Supp. 1950, § 9773.7 (Williams, § 9773.4).]"

In *Gordon's Transports, Inc. v. Bailey* (1956), 41 Tenn. App. 365, 294 S. W. 2d 313, 329, the court said in part as follows:

> "As we construe this Code section, its purpose is to prevent any party to a law suit from being taken by surprise by having an adverse party, without previous notice, present to a trial court law from another jurisdiction and have the trial court take judicial notice of same."

The trial judge charged fully on the subject of libel and on the subject of damages, and no exception was taken by Electric Furnace Corporation to his charge, and no exception was taken by Electric Furnace Corporation to his failure to charge on any subject.

We contend that Electric Furnace Corporation has not shown sufficient grounds for the issuance of a writ of certiorari and that certiorari should be denied.

Respectfully submitted,

B. P. GAMBRELL,
1234 National Bank of Georgia Bldg.,
Atlanta, Georgia 30303,

RAY H. MOSELEY,
Maclellan Building,
Chattanooga, Tennessee 37402,

Attorneys for Deering Milliken Research Corporation, Respondent.